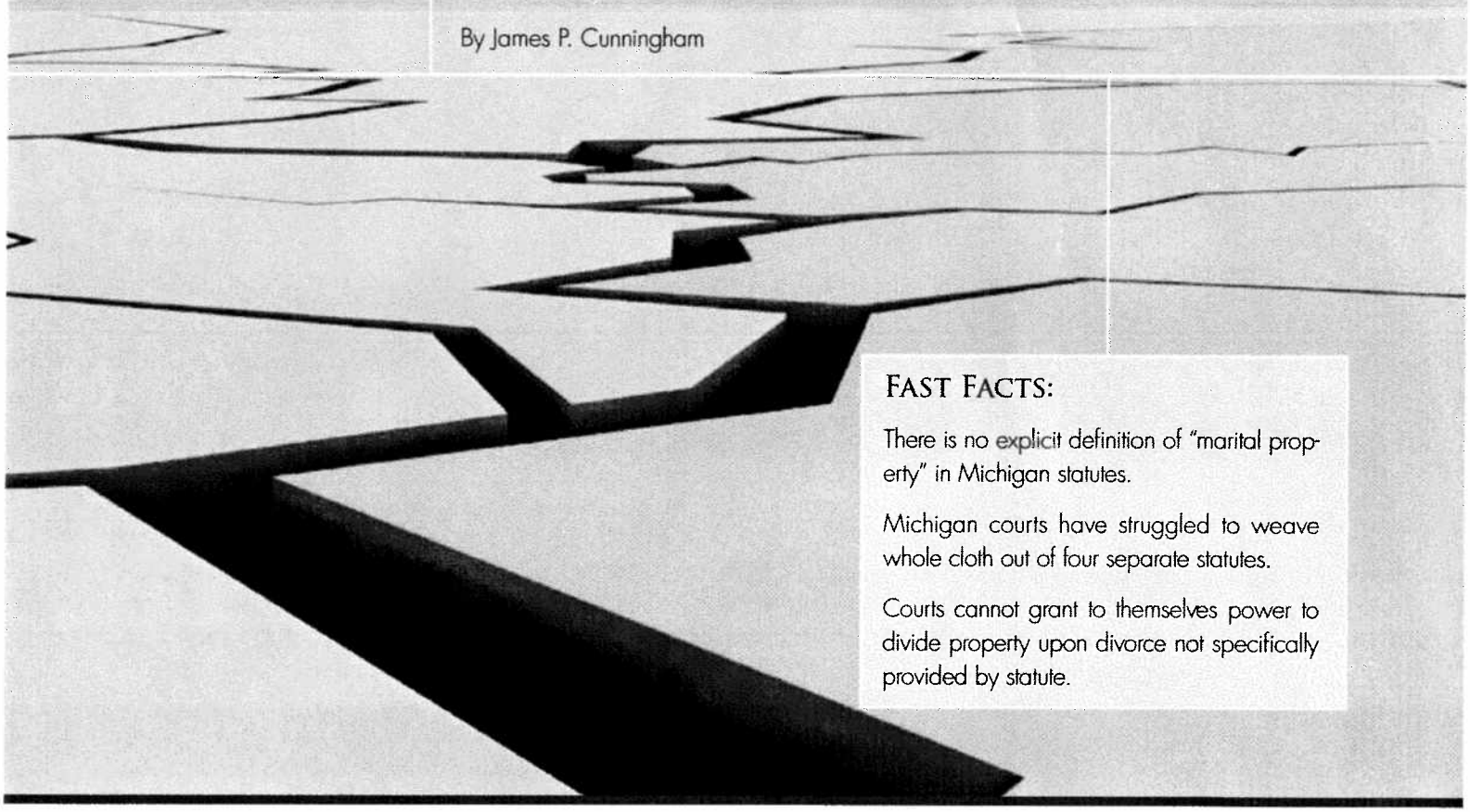
Separate Property in Michigan

Eating Jello with Chopsticks

By James P. Cunningham



FAST FACTS:

There is no explicit definition of "marital property" in Michigan statutes.

Michigan courts have struggled to weave whole cloth out of four separate statutes.

Courts cannot grant to themselves power to divide property upon divorce not specifically provided by statute.

Michigan is the only state with no comprehensive statutory definition of marital and separate property. Our courts have struggled to weave whole cloth out of four distinct statutes, passed at four separate times. The lack of a comprehensive update by the legislature of this patchwork statutory scheme is an obstacle to effective and efficient resolution of many divorce cases. The subtitle of this article is borrowed, with grateful permission, from a well-written article by Brett R. Turner, whose analysis is worthy of a wider audience.[1]

Background

In family law, there are two types of property division systems in the United States: the dual-classification system and the all-property system. Under dual-classification, the parties' assets are divided into two distinct categories: (1) marital, or community property; and (2) separate, or non-marital property. Separate property is awarded to the owning spouse. Marital property is divided equitably.[2] Under the all-property system, the court has the power to make an "equitable" division of all property, regardless of when and how it was acquired.

In states with equitable distribution laws, such as Michigan, statute is supposed to clearly and simply provide for the court's power to divide property, and what property. Michigan's statutes do not.

Michigan Property Statutes

Michigan has no single, yet comprehensive, statutory definition of marital and non-marital (or separate) property.[3] Separate property is subject to division if it falls under one of the following four provisions:

(1) Property whose "acquisition, improvement or accumulation resulted from the contributions" of the non-owning spouse (MCL 552.401)

(2) Property necessary for the "suitable support and maintenance" of the non-owning spouse (MCL 552.23)

(3) Property which shall have come to either party "by reason of the marriage" (MCL 552.19)

(4) Vested retirement benefits earned "during the marriage," and unvested retirement benefits earned "during the marriage" where "just and equitable" (MCL 552.18)

Case Law

The landmark case before 1980 is *Charlton v Charlton.*[4] The Supreme Court held that property is available for division only if expressly permitted by one of Michigan's property division statutes. The court's power to divide property comes exclusively from statute. Moreover, it is an axiom of statutory construction that no statute should be construed to be superfluous, and all statutes be given equal weight. The Court said:

> We must therefore conclude that [Section 401] remains because the Legislature intended to provide for separate situations and that the provisions of [Section] 401 do not apply to [Section] 23 and vice versa...[b]ecause the trial judge must consider all of the statutes provided, and each statute be given meaning.[5]

Unfortunately, for the next 20 years, the Michigan Court of Appeals was divided on the issue of property division, and two distinct lines of authority developed. One held that a trial court had the discretion to decide property in any manner that it chose.[6] The second line of cases rejected this expansiveness of equity, holding that statute was the exclusive determinate of a court's jurisdiction, à la *Charlton*. The tail of equity should not wag the dog of statute.[7]

The important Court of Appeals cases of *Reeves v Reeves* and *Byington v Byington* turned the corner that was to end the debate.[8] *Reeves* holds that "the trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." It specifically identified two of the statutes discussed 20 years earlier in *Charlton,* later to be dubbed the "invasion" statutes: contribution (§401) and need (§23). In *Byington,* the court elaborated on the dual-classification concept and cited for authority the *Lee v Lee* line of cases.

Lee v Lee, to become even more important later, took a stab at defining marital property, given statutes' failure to do so. It also implied that the "need" statute (§23) is a "last resort" to be considered after traditional spousal support, but non-marital property is not to be otherwise invaded.[9] So did *Byington,* six years later.

Present State of the Law

The 1999 Supreme Court decision of *Dart v Dart,* followed by *Deyo v Deyo,* ended any further discussion of a split of authority and made it clear, from case-law perspective, that Michigan upholds separate property or, more properly, a dual-classification state system.[10]

On its face, *Dart* was an action to enforce in Michigan a property division rendered in England. The issue was whether an English divorce judgment violated Michigan public policy by treating a husband's own assets, via family trusts, and trust income as separate property. The Court held, plainly:

> Normally, property received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property, not subject to equitable distribution. *Lee v Lee,* 191 Mich App 73, 477 NW2d 429 (1991)

Importantly, trust principal was actually distributed during the marriage. As well, resulting trust income was deemed separate property, as it was not in any sense a product of the marital partnership and not subject to division:

> The Dart fortune and defendant's interest in it exists independently of defendant's workplace activities or the marriage partnership.

The *Dart* citation of *Lee* is significant. It expressly quieted well-argued secondary authority that the *Demman* line supplants *Lee* under the authority of Michigan Supreme Court Administrative Order 1994-4. This gives *Lee* the force of Supreme Court authority and would appear to be controlling in the event of conflict.[11]

The appellate path of *Deyo v Deyo* is instructional. Decided without oral argument, the Supreme Court reversed a Court of Appeals affirmation of a trial court's "invasion" of clearly separate property under the "need" statute (§23). The Supreme Court remanded directly to the circuit court "for reconsideration of the property division." It held:

> The circuit court properly recognized that invasion of the plaintiff's separate inherited property is permitted only if the court specifically determines that a defendant "contributed to the acquisition, improvement, or accumulation of the property"...or that defendant's award is insufficient for her suitable support and maintenance....However, the circuit court's finding was insufficient to support either statutory basis.[12]

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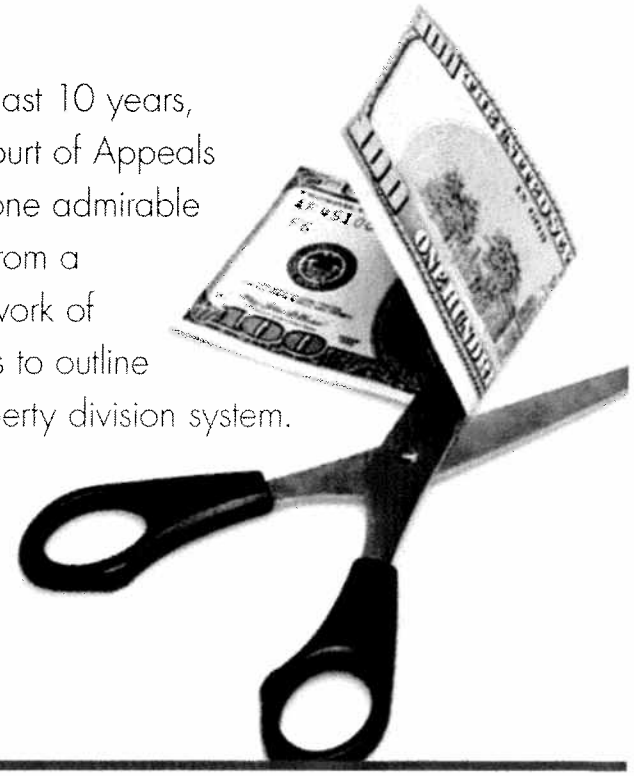


Legislation Needed

Dart makes it absolutely clear that Michigan is a dual-classification state. However, even *Dart*'s reference to separate property was, as Mr. Turner points out, "most casual."

We still do not have a statutory definition of "marital" or "nonmarital" property. Also, case law has focused on only two of the four statutory factors cited previously. There is nary a line to assist the practitioner with clear mandate on pensions and the statutory catch line, "by reason of the marriage."[13]

Why then, with case law more settled, is reform, or at least remedial legislation, so necessary? Mr. Turner said it clearly:

> The entire purpose for having statutes is to resolve questions of universal applications consistently in advance so that parties do not have to litigate the same basic questions over and over again. The existence of separate property [and a definition of marital property] should not be constantly litigated. The citizens of Michigan already spend large sums of money paying attorney fees and court costs in divorce cases.[14]

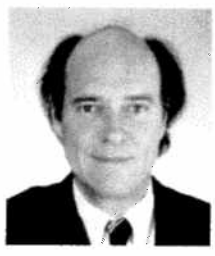
Consider also the enormous amount of trial time that trial judges and our appellate courts are spending on this issue. The amount of time saved by a straightforward, comprehensive statute would be inestimable.[15]

Conclusion

Courts do not have general equitable authority to divide property. The power to award property of one to another derives from statute and can be divided only when the requirement of one of Michigan's four present statutes is met.

In the last 10 years, our Court of Appeals has done admirable work from a patchwork of statutes to outline a property division system, with such cases as *Reeves v Reeves* and *Lee v Lee*. The Supreme Court in *Dart* placed its imprimatur on separate property and dual-classification, yet without elaboration.

We need to quit trying and deciding the same issues over and over again. Litigants, the Bar, and the judiciary need the legislature to revise MCL 552 *et seq.* and codify case law. We need statute to define what marital property is and what it is not. ■



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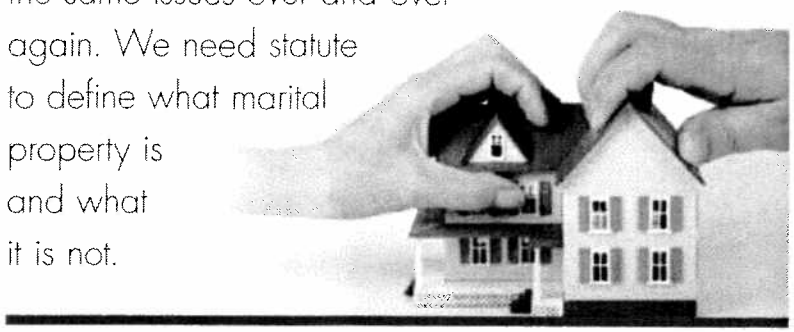

FOOTNOTES

1. Brett R. Turner, a senior attorney with the Family Law National Legal Research Group of Charlottesville, Virginia, concentrates in family law. His article appeared in *Divorce Litigation*, No 6, June 2000. He is the author of *Equitable Distribution of Property*, 3rd ed, Thomson West. It is generally considered the leading authority on property division in the United States, and should be on the bookshelf of every serious family law practitioner.
2. See, e.g., VA Code Ann 20-107.3; Ohio Rev Code Ann 3105.171.
3. See, e.g., Michigan Family Law (6th ed, 2007 Supp); Schaefer, *The uncertain state of Michigan equitable distribution law post-*Reeves, 79 Mich B J 168 (2000); Mastrangel, *The family jewels*, 73 Mich B J 552 (1994). Most secondary sources also urge the legislature to enact modern property division statutes.
4. *Charlton v Charlton*, 397 Mich 84; 243 NW2d 101 (1992).
5. *Id.*, pp 93–94.
6. See *Demman v Demman*, 195 Mich App 109; 489 NW2d 161 (1992); *Booth v Booth*, 194 Mich App 284; 486 NW2d 116 (1992); *Rogner v Rogner*, 179 Mich App 326; 445 NW2d 232 (1989).
7. *Lee v Lee*, 191 Mich App 73; 477 NW2d 429 (1991); *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995) (excluding base value of separate property, but dividing active appreciation in separate property business); *Davey v Davey*, 106 Mich App 579; 308 NW2d 468 (1981).
8. *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997); *Byington v Byington*, 224 Mich App 103; 568 NW2d 141 (1997). See also *Korth v Korth*, 256 Mich App 286; 662 NW2d 111 (2003). From December 2005 to February 2008, for example, *Reeves v Reeves* was recited with approval in 44 unpublished cases.
9. For further discussion, see Turner, *Equitable Distribution of Property*, 3rd ed (2007). See *Davey, supra*. Even if there is going to be an "invasion," it is only deserving of "compensation for the contribution," while "indirect and minor" will not be compensated. *Gregg v Gregg*, 133 Mich App 23 (1984).
10. *Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999), certiorari denied March 20, 2000; *Deyo v Deyo*, 474 Mich 952; 707 NW2d 339 (2005).
11. See Schaefer, *supra*. *Dart* also cites with approval *Charlton v Charlton, supra; Hanaway v Hanaway, supra;* and *Reeves v Reeves, supra*.
12. *Deyo, supra*, p 952. For authorities, it cites *Dart v Dart, supra* and *Reeves v Reeves, supra*.
13. See, e.g., *Boonstra v Boonstra*, 209 Mich App 558; 531 NW2d 777 (1995). *Boonstra* held §18 to expressly give a court the authority to divide pension benefits acquired *during the marriage*, but somehow construed the statute to permit division of pension benefits acquired *outside* the marriage. The statute, however, only expressly permits division of marital pension benefits. The decision ignores the construction of the statute, which specifically reads, "acquired during the marriage."
14. Turner, *supra*, p 120. In his article, Mr. Turner also provided a draft of a simple, straightforward Michigan dual-classification statute tailored very closely with Michigan's four previously described statutes. It also includes and suggests the "*Sparks* factors."
15. The other leading Michigan Supreme Court case in family law is *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992). Its absence from this discussion is not meant to be overlooked. *Sparks v Sparks* did not have a separate property issue. Importantly, *Sparks v Sparks* "codified" generations of case law by reciting the various factors a trial court must take into consideration in equitably dividing "marital property." Important also, virtually all recent dual-classification statutes, which define marital property, include the same or very similar factors.